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No. 09-333

IN THE

Supreme Court of the United States

GUADALUPE L. GARCIA, JR., *ET AL.*,
Petitioners,

v.

THOMAS VILSACK, SECRETARY,
UNITED STATES DEPARTMENT OF AGRICULTURE,
Respondent.

ROSEMARY LOVE, *ET AL.*,
Petitioners,

v.

THOMAS VILSACK, SECRETARY,
UNITED STATES DEPARTMENT OF AGRICULTURE,
Respondent.

On Petition For A Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF OF DEAN AND PROFESSOR PAUL SCHIFF BERMAN AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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October 16, 2009

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STATEMENT OF INTEREST

I, Paul Schiff Berman, am Dean and Foundation Professor of Law at the Sandra Day O'Connor College of Law at Arizona State University.[1] My interest in the case arises from having been a court-appointed amicus in a previous D.C. Circuit appeal raising the same issue. I continue to believe, as I did then, that the D.C. Circuit is severely misinterpreting U.S. Supreme Court precedent, and I file this brief purely from the perspective of one who supports just outcomes throughout the legal system.

SUMMARY OF ARGUMENT

Because the D.C. Circuit and its district courts have repeatedly misinterpreted U.S. Supreme Court precedent concerning the ability of litigants to seek judicial review under the Administrative Procedure Act, many potential meritorious claims have been denied even a hearing. Moreover, because of the nature of these cases, most if not all will arise in the D.C. Circuit, and U.S. Supreme Court review is therefore warranted at this time.

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[1] The parties have consented to the filing of this brief. Each party has been provided notice of my intent to file this *amicus* brief more than 10 days prior to this filing. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation of this brief. No person other than myself and my employer, the Sandra Day O'Connor College of Law at Arizona State University, made a monetary contribution to the preparation or submission of this *amicus* brief.

ARGUMENT

In a series of decisions stretching back over 20 years, the D.C. Circuit and its district courts have repeatedly misinterpreted U.S. Supreme Court precedent concerning the ability of litigants to seek judicial review under the Administrative Procedure Act ("APA"), 5 U.S.C. § 704, when they are also bringing additional claims under other statutes. *See, e.g.*, Petitioners' Brief at 11-17. In particular, litigants bringing a discrimination claim against a government agency under the Equal Credit Opportunity Act, 15 U.S.C. §§1691 *et seq*, have been prevented from bringing a separate APA claim alleging arbitrary and capricious government action despite the fact that these are separate claims with distinctly different elements. As a result, many potentially meritorious APA claims have been denied even a hearing. Moreover, because of the nature of this issue, it is unlikely to arise in other circuits. Accordingly, Supreme Court review is warranted now.

At issue is 5 U.S.C. § 704, which provides judicial review of agency actions "for which there is no other adequate remedy in a court." In *Bowen v. Massachusetts,* 487 U.S. 879, 903 (1988), this Court made clear that this language is merely intended to block additional judicial remedies in situations where Congress has already enacted special administrative review provisions. . As the Court noted, at the time the APA was enacted a number of the statutes creating administrative agencies had already defined specific procedures to be followed in reviewing the particular agency's action. *Id.* For

example, "Federal Trade Commission and National Labor Relations Board orders were directly reviewable in the regional courts of appeals, and Interstate Commerce Commission orders were subject to review in specially constituted three-judge district courts." *Id.* Accordingly, "[w]hen Congress enacted the APA to provide a general authorization for review of agency action in the district courts, it did not intend that general grant of jurisdiction to duplicate the previously established special statutory procedures relating to specific agencies." *Id.* However, the Court warned that this exception was intended solely to avoid such duplication and "should not be construed to defeat the central purpose of providing a broad spectrum of judicial review of agency action." *Id.*

Despite this admonition, the D.C. Circuit and its district courts have prevented litigants from bringing both ECOA and APA claims in a single lawsuit. Correctly concluding that ECOA provides an adequate avenue of relief for lending discrimination claims,[2] the courts have ignored the fact that the litigants were also raising APA claims, which by their very nature turn on whether agency action was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law." 5 U.S.C. § 706(2)(A) (2000). Such claims of arbitrary and capricious action may, of course, include discrimination, but it is clearly the case that

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[2] ECOA provides that "[i]t shall be unlawful for any creditor to discriminate against any applicant, with respect to any aspect of a credit transaction. . . . on the basis of . . . sex or marital status. . .". 15 U.S.C. § 1691(a)(1) (2000).

an agency action might be arbitrary and capricious without being discriminatory. Thus, litigants could win on an APA claim without winning on an ECOA claim. Accordingly, it cannot be said that ECOA provides an adequate remedy.

One need only consider the types of claims raised by litigants in the farm lending cases at issue here to see just how separable the ECOA and APA claims are. Many of the allegations clearly implicate concerns about arbitrary government action that are distinct from discrimination. For example, litigants have alleged that the Farm Services Administration prevented entry into beneficial programs, provided incorrect information, failed to provide required services, and so forth. Such allegations encompass improper government action, regardless of whether these actions were motivated by discriminatory animus.

The principle articulated in these decisions is potentially broad indeed. Using the logic of the D.C. Circuit, any time one raises a cause of action under a statute, all accompanying APA claims are therefore preempted. Such a precedent, if allowed to stand, would have extremely far-reaching consequences and would dramatically narrow the scope of relief afforded by the APA. Such restrictions on APA claims would be directly counter to this Court's statement in *Bowen* that the central purpose of the APA was to allow a broad spectrum of relief with regard to agency action. Further, because the D.C. Circuit is the principal forum for bringing APA claims, a circuit split is far less likely to arise, and this Court's review is warranted now to clarify the

proper meaning of *Bowen* and the proper scope of the APA.

CONCLUSION

The Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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October 19, 2009